

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID A. LLERAS)	
Claimant)	
VS.)	
)	Docket No. 5,008,471
VIA CHRISTI REGIONAL MEDICAL CENTER)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the July 15, 2005, Review and Modification of an Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 18, 2005, in Wichita, Kansas.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Review and Modification of an Award. In addition, at oral argument before the Board, respondent and its insurance carrier announced they were no longer challenging the mortality table introduced at the review and modification hearing.

ISSUES

This is a claim for an April 29, 2003, accident. The parties settled the claim on November 4, 2003. But the terms of the settlement reserved claimant's right to review and modify the nature and extent of his disability. Several days after the settlement hearing, on November 7, 2003, respondent eliminated claimant's job and terminated him.

Claimant then initiated this review and modification proceeding under K.S.A. 44-528. For purposes of the review and modification request, the parties stipulated that claimant now has a 38 percent work disability (a permanent partial general disability greater than the functional impairment rating) under K.S.A. 44-510e.

The only issue presented to Judge Barnes in the review and modification proceeding was the manner of calculating the weekly credit for retirement benefits as provided by K.S.A. 44-501(h). The Judge determined that the lump sum amount of retirement benefits that claimant received, or \$52,999.21, should be divided by his life expectancy, or 1,456 weeks, which yielded a weekly credit or offset of \$36.40.

But respondent and its insurance carrier contend Judge Barnes erred. They argue K.S.A. 44-501(h) is clear. They contend the gross lump sum amount of the retirement benefits should be divided by the number of weeks remaining in the award after the new work disability rating is applied. Accordingly, respondent and its insurance carrier contend claimant's permanent partial general disability benefits should be reduced by \$353.75 per week.

Conversely, claimant argues the Board should either adopt the method utilized by the Judge or, in the alternative, the Board should give respondent and its insurance carrier a credit of \$22,464, which represents 52 weeks for the year in which claimant received the lump sum payment, multiplied by the \$432 weekly compensation rate.

The only issue before the Board on this appeal is the method of computing the weekly equivalent of a retirement benefit under K.S.A. 44-501(h) when that benefit is paid to a worker in a lump sum.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

The facts are not in dispute. The parties agree that on November 4, 2003, claimant settled his claim with respondent for an April 29, 2003, low back injury. That settlement entitled claimant to receive permanent partial general disability benefits under K.S.A. 44-510e for a five percent whole person functional impairment. Within days of the settlement hearing, on November 7, 2003, respondent eliminated claimant's position and terminated him.

The settlement agreement reserved claimant's right to seek review and modification of his workers compensation award. The parties agree that claimant's settlement award

should be modified to increase claimant's permanent partial general disability to 38 percent commencing November 7, 2003, when he was terminated.

The parties also agree that on February 1, 2004, claimant was paid a lump sum retirement benefit of \$52,999.21, which netted claimant the sum of \$42,399.37 after taxes. The parties agree the retirement benefit was fully funded by respondent.

As indicated above, the only issue before the Board on this appeal is the manner of calculating a retirement benefit credit under K.S.A. 44-501(h) when the retirement benefit is disbursed in a lump sum. Unfortunately, the statute provides very little guidance. K.S.A. 44-501(h) reads:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim **shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits**, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment. (Emphasis added.)

At the review and modification hearing, claimant introduced a mortality table from the Pattern Instructions Kansas 3d. Claimant testified he was born on December 25, 1953, and the records of Dr. Philip R. Mills that were introduced into the record indicate claimant is Hispanic.

The Board is persuaded by claimant's argument that claimant's retirement benefits were intended to last him a lifetime. Consequently, the lump sum should be converted to a weekly equivalent amount by dividing the lump sum amount by claimant's estimated life expectancy. Claimant was 50 years old in February 2004 when he received the lump sum retirement benefit. Accordingly, claimant's estimated life expectancy at the time he received payment was approximately 28 years, or 1,456 weeks.¹

The Board concludes the gross sum of the retirement benefits, or \$52,999.21, should be divided by 1,456 weeks, which yields a weekly credit of \$36.40. Therefore, the

¹ The mortality table provides the life expectancies for white males and females, black males and females, and a column designated "total." The table does not provide the life expectancies for Hispanics. The 28 years used above is from the column for white males.

Board affirms the Judge's finding that claimant's permanent partial general disability should be increased from five percent to 38 percent as of November 7, 2003, when he was terminated by respondent. Moreover, the Board affirms the Judge's finding that commencing February 1, 2004, respondent and its insurance carrier are entitled to receive a retirement benefit credit under K.S.A. 44-501(h) in the sum of \$36.40 per week for the retirement benefits it disbursed to claimant in a lump sum.

AWARD

WHEREFORE, the Board affirms the July 15, 2005, Review and Modification of an Award entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully disagree with the majority as I do not believe K.S.A. 44-501(h) applies to lump sum payments of retirement benefits or that one can determine a weekly equivalent amount of the benefit without guessing or engaging in pure speculation.

First, the wording of K.S.A. 44-501(h) indicates that a retirement benefit credit applies only when a worker "is receiving" retirement benefits. After a lump sum amount has been paid, the worker is no longer "receiving" those benefits. In that respect, the statute is clear and unambiguous. Common English usage should not be ignored in interpreting legislative intent.

“[W]hen a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus, no room is left for statutory construction.”
“When determining whether a statute is open to construction, or in construing a statute, *ordinary words are to be given their ordinary meaning, and courts are not justified in disregarding the unambiguous meaning. . . .*”

When reviewing questions of law, a court may substitute its opinion for that of the administrative agency. Where the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature.²

Second, should lump sum payments qualify for the retirement credit or offset under K.S.A. 44-501(h), the statute provides absolutely no guidance how a lump sum is to be reduced to a weekly equivalent. Should one use the gross amount of a lump sum payment or should one use the net amount after taxes? Should funds that are rolled over into an Individual Retirement Account (IRA) and, therefore, paid to a trustee rather than to the worker be included in the lump sum amount or its weekly equivalent? Moreover, how should a lump sum be converted to a weekly amount? Should the imputed weekly amount be based upon the annuity that could be purchased with the lump sum amount or should the weekly amount be based upon a projected weekly cash flow that could be generated by such lump sum applying a reasonable capitalization rate? Moreover, many defined benefit plans give their participants choices regarding whether their scheduled payments are to be paid to a survivor or whether the scheduled payments are required to continue for a specified period regardless of the participant's death. Those options, likewise, affect the amount of the periodic benefit payment. Therefore, does the fact finder consider only the lump sum amount and the recipient's life expectancy in determining an imputed weekly retirement benefit?

In short, the facts now before us illustrate the significant difficulties in converting a lump sum payment to an imputed weekly equivalent. On the other hand, when retirement benefits from a defined benefit retirement plan are actually being paid on a regular periodic basis and actually being received by the worker, it is quite simple to determine the weekly equivalent amount for purposes of the K.S.A. 44-501(h) retirement credit.

² *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 980-981, 911 P.2d 198, rev. denied 260 Kan. 991 (1996) (alteration in original) (citations omitted).

K.S.A. 44-501(h) penalizes workers who receive retirement benefits. And as a penalty statute, it should be strictly construed. Accordingly, the Board should not speculate as to what the legislature intended regarding converting lump sum payments of retirement benefits to a weekly equivalent.

Under the majority's interpretation, employers now have an incentive to terminate injured workers and require them to withdraw their retirement funds in a lump sum regardless of their age or their intent to retire from the workforce as those funds could reduce the amount of permanent disability benefits that must be paid. In short, the opportunity now exists for employers to manipulate awards of permanent disability benefits.

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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ORDER NUNC PRO TUNC

The Board finds that a clerical error was made in the Order entered by the Board in the above-captioned claim in that the Board failed to enter the day the Order was signed. Accordingly, the Board modifies the Order to insert the date of December 22, 2005, as the day it was signed.

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director